



Steve Bullock
Governor

OFFICE OF THE APPELLATE DEFENDER STATE OF MONTANA

Wade Zolynski
Chief Appellate Defender

Date: January 29, 2015

To: Montana Public Defender Commission

From: Wade Zolynski, Chief Appellate Defender

RE: Office of the Appellate Defender Report to the Commission

Currently, the Office of the Appellate Defender (OAD) consists of the Chief Appellate Defender, nine assistant appellate defenders, and three support staff. The Public Defender Commission (PDC) appointed me Chief Appellate Defender May 16, 2012. The following is my ninth report to the Commission.

The legislative session has begun. This report outlines the data presented to the appropriations subcommittee in support of our request for additional funding. In essence, OAD has seen significant case increases thereby slowing Montana's justice system and negatively impacting Montana citizens.

1. **OAD Has Seen Significant Case Increases.**

a. **OAD's Cases Have Increased.**

OAD opened 183 new cases in FY 2010 and projects it will open 290 cases in FY 2015 – a 58% increase.

b. **Dependent and Neglect Cases Have Increased the Most.**

Dependent and Neglect cases have increased more than any other case type – we project a 43% increase between FY 2013 and FY 2015. OAD opened 60 DN cases in FY 2013, 71 in FY 2014, and it expects to open 86 in FY 2015.

c. **Case Weights Exceed National Recommendations.**

Most OAD attorneys have case weights far above those suggested by national standards. Due to turnover, OAD has hired three new attorneys in the past quarter. All three of the recently hired attorneys remain below the 22 recommended units. However, all other attorneys exceed the 22 units.

At times, the Montana Supreme Court has issued orders denying extension requests or indicating no further extensions would be granted. Additionally,

starting December 1, 2014, the Montana Attorney General adopted a policy in which it objects to any extension beyond the first extension in DN cases.

d. **OAD Would Need 9 Additional Attorneys to Keep Case Weights at National Recommendations.**

An average appeal is 1.5 units. If OAD receives the 290 cases it projects in FY 2015, it would need 9 additional attorneys for each attorney to remain within national case weight recommendations. ($290 \times 1.5 = 435$. $435/22 = 19.77$)

2. **Lack of Sufficient OAD Staff Has Caused Justice to Be Delayed.**

a. **Criminal Appeals Take Longer to Complete.**

In criminal cases, the average number of days from notice of appeal to completed briefing has increased by 70% since 2009. The average days in 2009 stood at 191. In 2014 it's 324.

b. **DN Appeals Take Longer to Complete.**

In DN cases, the average number of days from notice of appeal to completed briefing has increased by 40%. The average days in 2009 stood at 129. In 2014 it's 181.

c. **The Chief Justice of the Supreme Court Supports Additional OAD Funding.**

In a letter dated August 6, 2014, Chief Justice Mike McGrath told the Governor's Budget Director of his "ongoing concerns regarding the staff shortages in the Appellate Defender's office, and the concomitant impacts those shortages have on this Court's responsibility to process cases in a timely fashion." Chief Justice McGrath described case load increases as "dramatic" and recognized the increase in dependent and neglect appeals was "startling." He urged the Governor's office to provide an increase in OAD's budget noting that he is satisfied that "these employees are hard-working, diligent employees, but they do not have adequate resources to conduct their duties in a timely fashion."

3. **The Delay of Justice Has Negatively Impacted Montana Citizens.**

a. **Justice Denied in Dependent and Neglect Cases.**

The delay of dependent and neglect cases negatively impacts children and families. The abused children who are the subject of dependent and neglect appeals have been removed from the family home and remain in limbo while the wheels of justice churn slowly. The children remain in foster care and other temporary placements because an adoption cannot occur until the appeal process

is complete. Despite the state's best efforts, once removed from the home, a child is exposed to all the failings of the system. Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 Temp. Pol. & Civ. Rts. L. Rev. 663, 677 (2006). During this time a child's very basic life circumstances remain in a state of flux. Where and with whom the child lives, where the child attends school, and whether the child will receive proper medical care remains an open question. Pitchal, 15 Temp. Pol. & Civ. Rts. L. Rev. at 677. Additionally, children may "bounce and drift" from foster placement to foster placement. Pitchal, 15 Temp. Pol. & Civ. Rts. L. Rev. at 677. Without people and places to depend on, everything in the child's life remains transitory and uncertain. Jennifer Walter, *Averting Revictimization of Children, State Funding Needed for the Independent Counsel Representing Children in Juvenile Court*, 1 J. Center for Child. Cts. 45, 53 (1999). Evidence has shown that nearly fifty percent of children in some foster care systems have chronic medical conditions such as vision, hearing, and speech problems, untreated tooth decay, skin lesions, mental health problems, and a host of other difficulties. Walter, 1 J. Center for Child. Cts. at 52. Foster care children can have higher rates of acute and chronic health-care problems and developmental delays and are fifty percent more likely to be arrested as children, forty percent more likely to be arrested as adults, and thirty-three percent more likely to become substance abusers. Walter, 1 J. Center for Child. Cts. at 52-53. As a result, delay at the appellate level puts the most vulnerable party involved in abuse and neglect proceedings at real risk.

- b. **Justice Denied to Victims of Crime.** While the justice system becomes increasingly delayed at the appellate level, victims and their families remain in a confusing and lengthy legal process which causes stress and anxiety and frustrates the healing process,

In August, I received an e-mail from a member of a victim's family (referred to as Ms. Doe) who wanted to know how long the appellate process would take. Ms. Doe's mother had been killed by Ms. Doe's father, OAD's client. Ms. Doe indicated "the criminal justice system is pretty foreign to my family and while we have never expected justice and a final chapter to this nightmare to come swiftly, the unknown and anticipation of the next big punch in the gut looms large in our lives." Ms. Doe said, "Each month we check the docket and see another extension; doubt and fear creeps into our minds." Ms. Doe asked whether the opening brief would take months or "2 or 3 years due to caseload and priority."

- c. **Justice Denied to OAD Clients.**

Criminal defendants remain incarcerated without substantive legal assistance. Due to caseloads, a case can be extended seven months or more before the attorney assigned can start substantive work on the client's legal issues.

Moreover, clients who have been wrongfully convicted remain incarcerated, remain on state supervision, or are monetarily required to pay incorrect fines,

fees, or costs. Indeed, over the past four years OAD has obtained a reversal and/or remand in 101 cases.

Recently, OAD followed the *Anders* process with a client. This process permits the client to file a motion with the Supreme Court objecting or not objecting to our *Anders* process. The client filed his motion telling the Supreme Court he did not object to OAD's *Anders* process, but that he did "have objections that it took a state paid attorney almost a year to file" it.

4. **A Properly Staffed and Funded OAD Will Save Taxpayer's Money.** Three cases illustrate the point that OAD can pay for itself or actually save money.
 - a. **\$2,138,097 Saved in a Homicide Case.** On February 4, 2013, and again on June 24, 2014, OAD successfully defended a client who had been sentenced to 100 years at the Montana State Prison for deliberate homicide. His parole was restricted. Following OAD's success, the case against the client was dismissed. It cost the State \$35,634.95 per year to house an inmate at the Montana State Prison. Taking into account the parole restriction placed on the client and his eligibility for parole thereafter, OAD saved the State \$2,138,097 in incarceration costs.
 - b. **\$186,601 Saved in a Drug Case.** On July 6, 2013, OAD successfully defended a client who had been convicted of drug offenses and sentenced to 10 years (5 years at the Montana State Prison and 5 years on supervised release). Given the cost of incarceration (\$35,634.95 per year) and the cost of supervision (\$4.62 per day), OAD saved the State \$186,601.
 - c. **\$23,171 Saved in a Drug Case.** On August 4, 2014, OAD successfully defended a young man charged with drug offenses and sentenced to a three year deferred sentence. The young man served 178 days in jail before his case was resolved. With a cost of \$9.75 per day for intensive supervision and \$70.20 per day for pretrial incarceration, OAD saved \$23,171.
 - d. **Total Savings.** The savings realized for just these three cases totaled \$2,347,869. OAD expended \$1,478,050 in State funds during FY 2014.

Given the above data, the need for additional funding and staff at OAD is clear. OAD's caseload increases are in-fact slowing Montana's justice system thereby negatively impacting Montana citizens.